

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ARITHA D. SMITH)	
Claimant)	
VS.)	
)	
KOCH-GLITSCH, L.P.)	Docket No. 1,035,025
Respondent)	
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the December 11, 2009, Award of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded benefits for a 71 percent permanent partial whole body general disability (work disability) for injuries suffered through February 19, 2007.

Claimant appeared by her attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas C. Hobbs of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ except for Stipulation No. 1 regarding the date of accident. At oral argument to the Board, the parties stipulated that the appropriate date of accident in this matter would be February 27, 2007, the date claimant was placed on light duty by the authorized treating physician. Additionally, the parties stipulated that if a work disability is found to be appropriate in this matter, claimant has suffered a 100 percent loss of wages under K.S.A. 44-510e. Finally, the parties stipulated that temporary total disability compensation (TTD) is due and owing and was paid for the period from May 29, 2007, to May 31, 2007, December 14, 2007, to February 18, 2008, and June 11, 2008, to August 12, 2008, a total of 19 weeks at the weekly rate of \$453.68. No additional TTD is being claimed in this matter. The Board heard oral argument on February 19, 2010.

ISSUE

What is the nature and extent of claimant's injuries and disability? Respondent contends that claimant failed to prove injuries to her cervical spine and should be limited to functional impairments to her upper extremities under K.S.A. 44-510d, with no work disability. Claimant contends that the Award of the ALJ should be affirmed in that claimant injured her neck along with her upper extremities and is entitled to a work disability under K.S.A. 44-510e.

FINDINGS OF FACT

Claimant initially began working for respondent as a temporary employee through a temporary agency in June 1996. After about three months, claimant was hired as a full-time direct employee operating various machines for respondent. Claimant worked a job identified as "Structure Packaging/Operator II". This job required that she band parts together with a drill or rivet gun. The operation of the machines was hand intensive and required that claimant lift up to 35 pounds alone and up to 50 pounds with assistance. In February 2007, claimant began to notice symptoms in her left hand up to her shoulder. Claimant's hand was swollen and painful. She testified that the pain extended into her neck as well. Claimant was referred to V. J. Brown, M.D., a company doctor for respondent. She was initially diagnosed with severe carpal tunnel syndrome in her left hand. She continued to work and soon began to experience symptoms in her right hand as well. Claimant underwent a carpal tunnel release on the left side under the treatment of David Gwyn, M.D., in approximately May 2007. The surgery did not provide satisfactory relief for claimant, and Dr. Gwyn refused to perform the same surgery on the right side. Claimant continued to work for respondent, although with restrictions.

In October 2007, claimant came under the care of board certified orthopedic and hand surgeon George L. Lucas, M.D. Claimant was post surgery on her left upper extremity and was also experiencing pain, numbness and swelling in her right wrist at the time of the examination by Dr. Lucas. Claimant underwent electrodiagnostic studies and was diagnosed with moderate to severe carpal tunnel syndrome bilaterally. X-rays of the left wrist displayed widening of the scapholunate interval and an increased scapholunate angle indicating a scapholunate ligament injury. Dr. Lucas was concerned that the lack of success with the surgery to claimant's left upper extremity indicated something else was going on rather than simple carpal tunnel syndrome. Dr. Lucas treated claimant's right upper extremity with injections which provided some relief from the pain and numbness. This indicated probable carpal tunnel syndrome on the right side.

Claimant underwent a median nerve decompression on January 18, 2008, with improvement after the surgery. By February 19, 2008, claimant was returned to work with respondent with restrictions of no twisting, no lifting over 15 pounds and no vibrating tools. When claimant was examined on March 19, 2008, she complained of pain at the operative

site. However, claimant had no motor or sensory deficits at that time on the right side. At the May 7, 2008, examination, claimant reported that her hand symptoms were unchanged. Dr. Lucas determined that claimant had reached maximum medical improvement (MMI) and rated claimant at 5 percent to the right upper extremity and 3 percent to the left upper extremity, both pursuant to the fourth edition of the *AMA Guides*,¹ and allowed claimant to continue working light duty, with a new weight limitation of 20 pounds. Dr. Lucas has no record of any cervical complaints voiced by claimant. If claimant had complained of neck pain, Dr. Lucas would have possibly investigated for potential radicular problems from the neck.

Dr. Lucas was asked to consider a task list prepared by vocational expert Steve Benjamin. Of the 57 tasks on the list, claimant was found unable to perform 24, for a 42 percent task loss. Dr. Lucas was then asked to consider the task list of vocational expert Karen Terrill. Of the 35 non-duplicative tasks on the list, claimant was unable to perform 16, for a 46 percent task loss. When Dr. Lucas was asked if claimant's job duties were responsible for the development of the bilateral carpal tunnel syndrome, he was unable to answer. He determined that claimant's body habitus was the more probable cause.

Claimant was referred by respondent to board certified orthopedic surgeon John P. Estivo, D.O., for an examination and treatment on May 12, 2008. Claimant exhibited left shoulder pain and left-sided cervical spine pain. Claimant displayed some tenderness with range of motion of the cervical spine and left shoulder, but the remainder of the examination was normal. X-rays of the cervical spine and left shoulder were normal. MRIs of the left shoulder and cervical spine indicated a partial thickness rotator cuff tear and a possible SLAP lesion in the shoulder, and degenerative changes in the cervical spine, indicating mild disc bulging at C4-5 and C6-7. Dr. Estivo recommended an MR arthrogram which revealed the rotator cuff and glenoid labrum in the shoulder were intact, indicating no SLAP lesion. Claimant was diagnosed with a cervical spine strain and left shoulder rotator cuff tendinitis. By the June 12, 2008, examination, claimant was showing significant improvement with less cervical and shoulder pain after an injection into the shoulder. Claimant was treated with physical therapy and limited to light duty. However, it is noted that claimant last worked for respondent on June 10, 2008, as respondent was unable to meet the work restrictions placed on claimant.

Claimant was next evaluated on July 2, 2008, with the diagnosis remaining the same, including cervical spine strain and left shoulder rotator cuff tendinitis. Dr. Estivo recommended continued physical therapy and a second left shoulder injection. By July 16, 2008, claimant's neck pain had improved but the remainder of the examination remained the same, with tenderness throughout the neck with range of motion testing. At the

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

August 4, 2008, examination, claimant remained symptomatic in the neck and shoulder. Dr. Estivo determined that claimant had reached MMI and rated her at 5 percent to the whole person for the cervical spine impairment, pursuant to the fourth edition of the *AMA Guides*.² He gave no impairment for the shoulder as claimant had displayed a full range of motion in the shoulder. The only restrictions placed on claimant included no overhead work. Dr. Estivo reviewed the task list from Mr. Benjamin and determined that claimant had lost the ability to perform 18 of the 57 tasks for a 32 percent task loss. He then reviewed the task list of Karen Terrill and determined that claimant had lost the ability to perform 6 of 35 tasks for a 17 percent task loss. Dr. Estivo did not rate claimant's carpal tunnel syndrome as he had not been asked to evaluate claimant for those conditions. He did, however, consider the carpal tunnel syndrome when determining the task loss suffered by claimant.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on September 24, 2008. Dr. Murati had originally evaluated claimant on July 23, 2007, at which time he diagnosed claimant with myofascial pain syndrome in the shoulder girdles, bilaterally, recurrent carpal tunnel syndrome on the left, tenosynovitis of the left first digit, tenosynovitis of the right first and third digits, rotator cuff sprain versus tear, bilateral lateral epicondylitis, right carpal tunnel syndrome and right ulnar cubital syndrome.

Dr. Murati found the MRI of claimant's cervical spine to display central disc bulging at C4-5 and C6-7, with an otherwise unremarkable MRI of the cervical spine. Claimant was diagnosed at the September 24, 2008, examination with post bilateral carpal tunnel releases, left ulnar cubital syndrome, right trigger thumb, left lateral epicondylitis and myofascial pain syndrome in the bilateral shoulder girdles and into the cervical paraspinals. Dr. Murati found all of the diagnosed conditions to be the direct result of claimant's employment injuries with respondent.

Dr. Murati rated claimant pursuant to the fourth edition of the *AMA Guides*³ with a 10 percent right upper extremity impairment for the carpal tunnel syndrome and a 22 percent impairment to the right upper extremity for the trigger thumb condition, which combine for a 30 percent right upper extremity impairment. He rated claimant with a 10 percent left upper extremity impairment for the carpal tunnel syndrome, a 10 percent impairment to the left upper extremity for the ulnar cubital syndrome, a 3 percent impairment to the left upper extremity for the lateral epicondylitis and a 9 percent impairment to the left upper extremity for the loss of range of motion in the shoulder, all of which combine for a 28 percent impairment to the left upper extremity. Finally, Dr. Murati rated claimant at 5 percent to the whole body for the myofascial

² *AMA Guides* (4th ed.).

³ *AMA Guides* (4th ed.).

pain syndrome in the cervical paraspinals placing claimant in the Cervicothoracic DRE Category II. All combined, claimant was assessed a 35 percent whole person impairment.

Dr. Murati testified that the loss of range of motion in the cervical spine was due to muscle cramps, but described the overall condition as a sprain. After reviewing the task list of Karen Terrill, Dr. Murati determined that claimant had lost the ability to perform 29 of the 35 non-duplicative tasks for an 83 percent task loss.

Claimant was referred by respondent to board certified neurological surgeon Paul S. Stein, M.D., on May 5, 2009. Claimant displayed a markedly restricted range of motion of the neck with diffuse tenderness throughout her neck, trapezius muscles and shoulders to palpation. Dr. Stein found no muscle spasm in any of these areas, but the active range of motion of claimant's left shoulder was markedly restricted. Claimant displayed tenderness over the left hand, wrist and forearm, but the range of motion of the wrists was within normal range. Claimant did display a mild grip weakness in the hands bilaterally, with the left weaker than the right.

For the bilateral carpal tunnel syndrome, Dr. Stein assessed claimant a 10 percent to each upper extremity pursuant to the fourth edition of the *AMA Guides*.⁴ Claimant was restricted from repetitive work with no sustained or forceful grip and no use of vibratory or power tools with either hand.

When testifying about the limited range of motion and diffuse tenderness in claimant's neck, Dr. Stein felt there was some emotional component to the symptomatology. He placed claimant in the DRE Category II with a 5 percent whole body impairment, also pursuant to the fourth edition of the *AMA Guides*.⁵ For the cervical and left shoulder complaints, Dr. Stein expressed concern that nonphysical secondary gain factors were involved. The MRI tests and MR arthrogram did not justify the tremendous lack of movement in the neck and shoulder. Dr. Stein stated that if other nonphysical factors were involved, the rating to the cervical spine would be zero percent. He did not rate claimant's left shoulder as he could not determine the basis upon which claimant had so much restriction of motion. Dr. Stein recommended that claimant be evaluated by board certified clinical psychologist Theodore Allen Moeller, Ph.D.

Dr. Moeller evaluated and tested claimant on two occasions. The first evaluation occurred on June 4, 2009, and the second on June 9, 2009. Dr. Moeller evaluated claimant during a personal interview and during a series of psychological tests administered to claimant. The tests indicated that claimant was describing more psychological distress than she was actually experiencing. Dr. Moeller diagnosed claimant

⁴ *AMA Guides* (4th ed.).

⁵ *AMA Guides* (4th ed.).

with “malingering: Depressive Disorder”⁶ and noted a tendency on claimant’s part to overstate the amount of psychological distress claimant was experiencing. He could find no clear indication that claimant’s depression was caused or created by the work-related physical injury suffered while working for respondent. Dr. Moeller also found claimant to display secondary gain issues indicating that she was portraying herself as having a higher disability than she actually had because of the benefit that could accrue. Dr. Moeller also determined that this effort on claimant’s part was conscious. He acknowledged on cross-examination that claimant’s anger or frustration with her employer’s failure to treat her appropriately could affect the test results.

As the result of reviewing Dr. Moeller’s report, Dr. Stein determined that claimant was making a conscious effort to magnify her symptoms. This caused the rating for claimant’s cervical impairment to be recorded as zero. Dr. Stein stated that he was not able to determine an objective functional impairment to either the neck or shoulder. He did determine that the impairment for the bilateral carpal tunnel syndrome was appropriate.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁷

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.⁸

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁹

It is not disputed that claimant suffered injuries to her upper extremities while working for respondent. The diagnosis of bilateral carpal tunnel syndrome is not disputed. Additionally, claimant was rated at 10 percent for each upper extremity for that condition by more than one of the testifying doctors. The Board finds that claimant suffered accidental injuries to her upper extremities, developing bilateral carpal tunnel syndrome as

⁶ Stein Depo., Ex. 2 (Dr. Stein’s June 24, 2009 report).

⁷ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

⁸ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁹ K.S.A. 2006 Supp. 44-501(a).

the result, and is entitled to a 10 percent impairment of function for each upper extremity at the level of the forearm for that condition.

The dispute in this matter extends to claimant's upper extremities beyond the carpal tunnel syndrome and into the left shoulder and neck. Claimant has been examined and/or treated by a number of physicians in this matter for the alleged injuries to her left shoulder and neck. Both Dr. Stein and Dr. Estivo found claimant to have suffered permanent impairment to her neck but not her shoulder. Initially Dr. Estivo thought claimant's left shoulder was seriously injured with a possible partial thickness tear of claimant's rotator cuff and a possible SLAP lesion (a tear to the glenoid labrum). However, followup tests diagnosed neither. Claimant was thought to have only tendinitis in the shoulder, and Dr. Estivo assessed claimant no permanent impairment for that condition. Dr. Stein found no muscle spasm in the shoulder. He expressed significant concern regarding the tremendous lack of movement in the shoulder even without objective pathology. Only Dr. Murati assessed claimant with permanent impairment for the shoulder for the loss of range of motion. Finally, the evaluation by Dr. Moeller indicated serious malingering and symptom magnification by claimant. This calls into question the range of motion symptoms in the shoulder without significant objective findings. The Board finds that claimant has failed to prove that she suffered a permanent work-related injury to her shoulder for which there is an appropriate rating under the *AMA Guides*.

The Board must next consider claimant's allegations of a permanent impairment to her cervical spine. The record is more conflicting on this issue. Both Dr. Estivo and Dr. Murati found claimant to have suffered a permanent impairment to the cervical spine from the injuries while working for respondent. Dr. Estivo found the x-rays of the cervical spine to be basically normal with claimant being diagnosed with only a strain. He assessed claimant a 5 percent whole body impairment for the strain. Dr. Murati, on the other hand, diagnosed claimant with myofascial pain syndrome of the cervical paraspinals and assessed claimant a 5 percent whole body functional impairment for that condition. Finally, Dr. Stein assessed claimant a 5 percent whole body functional impairment for claimant's cervical symptoms but expressed concern that claimant's actual symptoms were possibly the result of nonphysical secondary gain. This would cause his cervical impairment to be reduced to zero under the *AMA Guides*. In order to determine the legitimacy of claimant's cervical complaints, Dr. Stein recommended that claimant be referred to Dr. Moeller, a clinical psychologist, for an evaluation and testing.

Dr. Moeller evaluated claimant on two occasions, June 4 and June 9, 2009. Claimant was subjected to an entire battery of psychological tests. The end result was that claimant was found to be exhibiting a conscious effort to make her physical condition worse than it actually was. Dr. Moeller called claimant's efforts malingering and identified her actions as being motivated by secondary gain due to ongoing litigation and a conscious effort to portray herself as having a higher disability than she actually had. The results of one test, the "Structured Interview of Malingered Symptoms", found claimant to have a

raw score of 22. Anything over 14 was an indication that the individual was falsifying symptoms or was a malingerer. Claimant had gone so far as to allege that her thyroid condition and high blood pressure could be attributed to her work-related injury, even though she could provide no basis for making those allegations. Dr. Moeller acknowledged that his findings did not rule out the possibility that claimant had sustained an injury to her cervical spine. His opinion merely reflected questions regarding the nature of claimant's injuries on the dates he evaluated claimant.

When Dr. Stein was provided the results of Dr. Moeller's tests, he concluded that claimant did not have a legitimate impairment to her cervical spine and assessed her a zero impairment for that area of complaint. Neither Dr. Estivo nor Dr. Murati were asked to evaluate the test results and opinions expressed by Dr. Moeller.

The Board finds the results of the tests performed by Dr. Moeller raise serious question regarding claimant's physical injuries suffered as the result of her job with respondent. The opinions of Dr. Stein are found to be the most persuasive herein, and claimant is found to have failed in her burden of proving that she suffered permanent impairment to her cervical spine as the result of her job with respondent. The Award of the ALJ is reversed on that issue, and claimant is limited to a functional impairment for each upper extremity for the bilateral carpal tunnel syndrome.

K.S.A. 44-510c(a)(2) states:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

If the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in any type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability.¹⁰

The Kansas Supreme Court, in *Casco*, determined that K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when injuries as above described occur. As claimant's condition has been limited to her bilateral upper extremities, the issues raised by the Court in *Casco* must be addressed. Vocational expert

¹⁰ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 528, 154 P.3d 494, *reh'g denied* (2007).

Karen Terrill found claimant to have a 100 percent loss of wages as claimant was not working at the time of her evaluation. However, Ms. Terrill did not describe claimant as being permanently and totally disabled. Additionally, Ms. Terrill acknowledged that there were currently jobs available in the open labor market that would be both within claimant's educational and training experience and within her restrictions.

Claimant was also evaluated by vocational expert Steve Benjamin, who determined that claimant had suffered a loss of earning ability of between 33 percent and 48 percent utilizing the restrictions of Dr. Estivo and Dr. Lucas respectively, another indication that claimant is not permanently and totally disabled. The Board finds that respondent has rebutted the presumption of permanent total disability contained in K.S.A. 44-510c(a)(2). Claimant is, therefore, awarded a 10 percent functional disability to each upper extremity at the level of the forearm for the bilateral carpal tunnel syndrome.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to limit claimant's award to a 10 percent functional disability to each upper extremity at the level of the forearm for the bilateral carpal tunnel syndrome. The Award of the ALJ with regard to unauthorized medical, future medical, fees and costs associated with this litigation and claimant's attorney fee contract are affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated December 11, 2009, should be, and is hereby, modified to limit claimant's award to 10 percent to each upper extremity at the level of the forearm for the diagnosed bilateral carpal tunnel syndrome and based on a stipulated injury date of February 27, 2007.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Aritha D. Smith, and against the respondent, Koch-Glitsch, L.P., and its insurance carrier, Old Republic Insurance Company, for an accidental injury which occurred on February 27, 2007, and based upon an average weekly wage of \$680.49.

Left Upper Extremity

Claimant is entitled to 0.43 weeks of temporary total disability compensation at the rate of \$453.68 per week in the amount of \$195.08, followed by 19.96 weeks of permanent partial disability compensation at the rate of \$453.68 per week in the amount of \$9,055.45

for a 10 percent permanent partial disability to the left upper extremity at the level of the forearm, making a total award of \$9,250.53.

Right Upper Extremity

Claimant is entitled to 18.57 weeks of temporary total disability compensation at the rate of \$453.68 per week in the amount of \$8,424.84, followed by 18.14 weeks of permanent partial disability compensation at the rate of \$453.68 per week in the amount of \$8,229.76 for a 10 percent permanent partial disability to the right upper extremity at the level of the forearm, making a total award of \$16,654.60.

As of the date of this Award, the entire amounts above awarded would be due and owing and ordered paid in one lump sum, minus amounts already paid.

The Award of the ALJ with regard to unauthorized medical, future medical, fees and costs associated with this litigation and claimant's attorney fee contract are affirmed.

IT IS SO ORDERED.

Dated this ____ day of March, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge